The judgment, therefore, has been flawed by those two errors of law. I therefore would allow this appeal and enter judgment for the plaintiffs for the amount they have claimed with interest at the appropriate rate and the plaintiffs to have their costs of this appeal and before the magistrate.

Appeal allowed.

Solicitors: *Susanna Lim and Co.*

A MALAYSIAN REPORTS

HEE NYUK FOOK v. PUBLIC PROSECUTOR

[S.C. (Seah, Hashim Yeop A. Sani & Syed Agil Barakbah S.C.JJ.) 7 March & 28 May 1988]

B **[Kuala Lumpur – Supreme Court Criminal Reference No. 1 of 1988]**

Criminal Procedure – Charge – Amendment of – During the course of trial – Whether it is mandatory to read and explain amended charge – Failure to do so – Whether curable – Criminal Procedure Code (FMS Cap. 6), ss. 156, 158(ii), 167, 168, 173(h), (i) & (j) & 422.

C In this case, the applicant had been charged with the offence of cheating under section 420 of the Penal Code, *viz.* by dishonestly inducing one Wong Won Chong to deliver to the applicant cash of $40,000 for the purchase of a stolen Mercedes Benz motor car. During the course of the trial in the Sessions Court, the charge was amended twice. D The first amendment made at the close of the prosecution case related to the particulars of the amount involved, from cash of $40,000 to $37,000. The amended charge was read over to the applicant but not explained to him. The second amendment was made after the close of the defence and submissions by the defence counsel and the prosecution. The charge was amended to include the words "cash E cheque No. 271784 for a sum of $37,000". The amended charge was neither read nor explained to the applicant. The applicant was found guilty, convicted and sentenced. His appeal to the High Court was dismissed. The applicant was then granted leave to refer the following questions of law of public interest to the Supreme Court:

F (a) Where in the course of trial a charge is amended, is it mandatory to read and explain the amended charge to an accused person pursuant to the provision of section 158(ii) of the Criminal Procedure Code.

(b) If the answer to (a) is in the affirmative, then is the omission to read and explain the amended charge to an accused person a mere irregularity which can be cured G by recourse to section 422 of the Criminal Procedure Code.

Held: (1) the question whether section 158(ii) of the Criminal Procedure Code is mandatory or directory depends on the facts and circumstances of a particular case, the purpose and object for which such provision is made, H the intention of the legislature in making the provision and the serious inconvenience or injustice which may result in treating the provision one way or the other. No hard and fast rule can be laid down merely from the use of the word "shall" therein;

(2) applying the test to the facts and surrounding circumstances of the case, the provision of section 158(ii) of I the Criminal Procedure Code, in so far as this case is concerned, is not imperative but directory. The provisions contained therein only lay down a rule of procedure and do not relate to the mode of the trial. *A fortiori* in the light of the provision of section 422 of the Code;

(3) the nature of the amendment being purely technical and in no way substantial has not rendered the omission

to read over and explain the amended charge at the close of the defence a serious irregularity as to vitiate the proceeding or occasion a failure of justice;

(4) as regards the first amendment, there was no need for the amended charge to be explained to the applicant after it was read over to him by virtue of section 173(h), (i) and (j) of the Criminal Procedure Code. As regards the second amendment, there was no need for the learned President to amend the charge at all at the end of the trial by virtue of section 156 of the Code since the applicant would not be misled by such an omission. Further, sections 167 and 168 of the Code empower the court to convict an accused person with an offence other than the offence charged or with an attempt to commit the said offence without the accused being separately charged. If at all there was any necessity, the failure to do so did not amount to an irregularity which has occasioned a failure of justice and in any way prejudiced the trial by virtue of section 422 of the Code.

Cases referred to:

(1) *Howard* v. *Bodington* (1877) 2 P.D. 203 (refd).
(2) *Singah Mohamed Hussin* v. *Public Prosecutor* [1973] 2 M.L.J. 109 (distd).
(3) *S. Govindasamy* v. *Public Prosecutor* [1949] 1 M.L.J. 101 (distd).

SUPREME COURT.

Harpal Singh Grewal for the applicant.

Stanley Isaacs (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Syed Agil Barakbah S.C.J. (delivering the judgment of the court): On 9 February 1988, the applicant was granted leave by this court to refer two questions of law of public interest under section 66 of the Courts of Judicature Act 1964. They are:

(a) Where in the course of trial a charge is amended, is it mandatory to read and explain the amended charge to an accused person pursuant to the provision of section 158(ii) of the Criminal Procedure Code.

(b) If the answer to question (a) is in the affirmative, then is the omission to read and explain the amended charge to an accused person a mere irregularity which can be cured by recourse to section 422 of the Criminal Procedure Code.

We heard the application and the arguments by counsel on 7 March 1988 and will now give our decision.

The applicant was originally charged and tried in the Sessions Court, Kuala Lumpur, for cheating under section 420 of the Penal Code, *viz.* by dishonestly inducing one Wong Won Chong to deliver to the applicant cash of $40,000 (later amended to $37,000) for the purchase of a stolen Mercedes Benz 300D motor car BBD 7375. He was found guilty of the charge, convicted and sentenced by the President of the Sessions Court to eighteen months' imprisonment. He appealed to the High Court against the conviction and sentence. The appeal was, however, dismissed and the conviction and sentence were confirmed.

In the course of the trial in the Sessions Court, the charge was amended on two occasions. The first amendment related to the particulars of the amount involved, *i.e.* from cash of $40,000 to $37,000 and was made at the close of the prosecution case. The amended charge was read over to the applicant, but was not explained to him. The second amendment was made after the close of the defence and submissions by the defence counsel and the prosecution. The charge was amended to include the words "cash cheque No. 271784 for a sum of $37,000". The amended charge was neither read nor explained to the applicant. Thereafter he was found guilty and convicted.

It was submitted that non-compliance with the provision of section 158(ii) of the Criminal Procedure Code is an irregularity which is not curable under section 422 of the Code.

Section 158 states:

"(i) Any court may alter or add to any charge at any time before judgment is pronounced or in the case of trials by jury or trials with the aid of assessors before the verdict of the jury is returned or the opinions of the assessors are expressed.

(ii) Every such alteration or addition shall be read and explained to the accused."

Section 422 of the Code says:

"Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a court of competent jurisdiction shall be reversed or altered on account –

of any error, omission or irregularity in the complaint, summons, warrant, charge, judgment or other proceedings before or during trial, or in any inquiry or other proceeding under this Code; or

...

unless such error, omission, improper admission or rejection of evidence, irregularity, want or misdirection has occasioned a failure of justice."

The question that arises is whether section 158(ii) is mandatory or directory. In our view, the word "shall" appearing therein, though generally taken as mandatory, does not mean to be so in every case. No hard and fast rule can be laid down because it depends on the facts and circumstances of a particular case, the purpose and object for which such provision is made, the intention of the legislature in making the provision and the serious inconvenience or injustice which may result in treating the provision one way or the other (see *Interpretation of Statutes* by Bindra, 7th Ed., p. 662). We are of the view that the safest way is to look into the subject-matter of the case, consider the importance of the provision that has been disregarded, the relation of the provision to the object of the Code and decide in that order whether the matter is imperative or only directory (see *Howard* v. *Bodington*[1] at p. 211).

Applying the test to the facts and surrounding circumstances of the case, we hold that in so far as this case is concerned, the provision of section 158(ii) is not imperative but directory. The provisions contained therein only lay down a rule of procedure and do not relate to the mode of trial. *A fortiori* in the light of the provision of section 422 of the Code. The nature of the amendment being purely technical and in no way substantial has not rendered the omission to read over and explain the amended charge to the applicant at the close of the defence a serious irregularity as to vitiate the proceeding or has occasioned a failure of justice.

Applying the test to the facts and surrounding circumstances of the case, we hold that in so the applicant after it was read over to him by virtue of section 173(h), (i) and (j) of the Code. Section 173(h), (i) and (j) of the Code reads:

"(h) If, when such evidence has been taken, the court is of opinion that there are grounds for presuming that the accused has committed the offence charged or some other offence which such court is competent to try and which in its opinion it ought to try, it shall consider the charge recorded against the accused and decide whether it is sufficient and, if necessary, shall amend the same.

(i) The charge if amended shall be read to the accused as amended and he shall be again asked whether he is guilty or has any defence to make.

(j) If the accused does not plead guilty to the charge as amended or if no amendment is made the accused shall then be called upon to enter upon his defence and to produce his evidence, and shall at any time while he is making his defence be allowed to recall and cross-examine any witness present in the court or its precincts."

In the instant case, he was called upon to enter his defence after the amended charge was read over to him.

With regard to the second amendment, we are of the opinion that there was no need for the learned President of the Sessions Court to amend the charge at all at the end of the trial by virtue of section 156 of the Code since the applicant would not be misled by such omission. He was defended by counsel and from the facts and circumstances of the case, the amendment was not material. Further, sections 167 and 168 of the Code empower the court to convict an accused person with an offence other than the offence charged or with an attempt to commit the said offence without the accused being separately charged. There was therefore no necessity at all for the President of the Sessions Court to read over and explain the amended charge to the applicant before proceeding to convict the applicant. If at all there was any necessity, the occasion to do so does not amount to an irregularity which has occasioned a failure of justice and in any way prejudiced the trial by virtue of section 422 of the Code.

We do not think the authorities cited to us are relevant. In *Singah Mohamed Hussin* v. *Public Prosecutor*[2] the original charge did not disclose the actual offence until it was amended at the close of the defence by the trial magistrate. Had he not done so, the trial would have been a nullity. It was therefore necessary for the magistrate to read over the charge and explain it to the appellant even at the close of the defence. In *S. Govindasamy* v. *Public Prosecutor*[3] the record did not show that the trial judge gave any judgment and that there was positive agreement between the trial judge and the assessors. The record only showed that the trial judge passed sentence of death following the opinion of the assessors that the accused was guilty of murder. The trial judge failed to comply with section 198(i) of the Code which is mandatory and relates to the mode of trial. The conviction and sentence were quashed. In both these cases, the courts ruled that the omission to comply with the relevant provisions in the circumstances was an irregularity which cannot be cured by section 422 of the Code.

Order accordingly.

Solicitors: *Ariffin Chong & Harpal.*